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IN THE

Supreme Court of the United States

October Term, 1965

No. 456 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

Petition for a Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

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IN THE

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No. .....

WILLIAM L. AUSTIN,

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vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

Petition for a Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Petitioner, William L. Austin, prays that a writ of certiorari issue to review the judgment of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, entered in the above entitled case on February 28, 1964.

Opinions Below.

The case was initially tried before a trial commissioner, and jury, in the Quarterly Court of McCracken County, Commonwealth of Kentucky. No opinion was delivered by the said court. On appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, the case was tried *de novo* before a judge and jury. No opinion was delivered by the said court. The

per curiam opinion of the Court of Appeals of Kentucky, Chief Justice Moremen dissenting, overruling petitioner's motion for an appeal [R. 147], is reported in 386 S.W. 2d 270. No opinion was delivered in overruling petitioner's petition for rehearing.

Jurisdiction.

The judgment of conviction of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky was entered on February 28, 1964 [R. 11]. A copy of the said judgment is annexed hereto as Appendix A. Petitioner's motion for an appeal from said judgment of conviction was denied in a *per curiam* opinion by the Court of Appeals of Kentucky on January 22, 1965, Chief Justice Moremen dissenting, without opinion. A copy of the said *per curiam* opinion and order are annexed hereto as Appendix B. Petitioner's due and timely petition for rehearing [R. 148-149] was overruled by the Court of Appeals on March 19, 1965 [R. 135, 151]. 386 S.W. 2d 270. By reason of the aforesaid, the judgment of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, is the highest court of the State of Kentucky "in which a decision could be had". See, *Butler v. Michigan,* 352 U.S. 380, 382; *Thompson v. City of Louisville,* 362 U.S. 199, 202. By order of Justice Potter Stewart dated June 8, 1965, the time to file this petition for a writ of certiorari was extended to and including August 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Whether, consistent with the free speech and press provisions of the First Amendment and the due process requirements of the Fourteenth Amendment, as well as the constitutional standards for judging obscenity enunciated by decisions of the Supreme Court, the two publications involved in the prosecution herein upon which the judgment of conviction was rendered are entitled to constitutional protection.

2. Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First, Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be obscene "shall be prima facie evidence" that the seller had "knowledge of the obscene character" of the publication;

(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered.

3. Whether the wholesale exclusion of essential comparable evidence offered by petitioner on the issue of contemporary community standards arbitrarily deprived petitioner of his liberty without due process of law and abridged freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Kentucky Revised Statutes, Section 436.100, subdivisions 1, 2 and 4, are annexed hereto as Appendix C.

Statement of the Case.

(a) By complaint, sworn to by Mrs. Katherine Wathen and filed in the Quarterly Court of McCracken County, Commonwealth of Kentucky on October 11, 1963 [R. 2], petitioner was charged with selling, offering to sell, having in possession, with intent to sell and offer to sell, two magazines, to wit: Volume 1, No. 38 of a publication known as "Spree", and Volume 2, No. 6 of a publication known as "High Heels", it being alleged by the affiant Wathen that both of said publications were "obscene" and contained "obscene pictures and writing or printed material of an indecent character". The verified complaint alleged that petitioner had knowledge of the "contents or character" of the two magazines [R. 2]. The case came on for trial before a Trial Commissioner and a jury of six in the Quarterly Court of McCracken County, Commonwealth of Kentucky. The jury found petitioner guilty as charged, and fixed the punishment at a fine of $100.00 [R. 3]. Peti-

tioner prosecuted an appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky [R. 5]; *supersedeas* was granted [R. 6]; and the case thereupon came on for trial *de novo* before the Honorable C. Warren Eaton, a Judge of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, and a jury, on February 27 and 28, 1964 [R. 38].

(b) The petitioner is in the wholesale news distribution business, with agencies in Shelbyville, Jackson and Nashville, Tennessee; Carbondale, Illinois, and Paducah, Kentucky [R. 60]. For many years, the petitioner has also owned and operated [R. 38] a large retail book store and newsstand known as Readmore, located in Paducah, Kentucky [R. 61], where hard cover books from all major publishers are sold, including technical works, religious treatises and children's books [R. 61-62]. Petitioner is a member of the American Book Sellers Association and Christian Book Sellers Association [R. 62]. Readmore also sells newspapers, paperback books and magazines [R. 62-63]. There are about 11,000 titles handled at Readmore each month, to wit, about

> "three thousand titles, approximately, on sale, magazines, all time, and approximately four thousand titles of hard books, and approximately four thousand titles of the paper back books, and we have the newspapers in addition" [R. 63].

The case against petitioner was as follows: On the 28th day of September, 1963, Katherine Wathen, a resident of Paducah, went into Readmore, and purchased from a saleslady in the store, two magazines. For each of the periodicals — "High Heels", vol. 2, No. 6 [Comm.

Ex. 1, R. 40] and "Spree", No. 38 [Comm. Ex. 2, R. 40] — the witness paid $1.00 plus tax [R. 40]. Prior to the purchase on September 28, 1963, Mrs. Wathen called Mrs. Patsy McWaters and told her that she, Mrs. Wathen, was going to Readmore "to buy magazines" and that she would like Mrs. McWaters to be present when the purchase was made, "so she could be a witness" in court [R. 48]. Thus, Mrs. McWaters was present at the time of the purchase of the two magazines [R. 42]. After the purchase of the publications, Mrs. Wathen took the two magazines home, read "practically all" of the contents, and then brought them to the courthouse where "the summons was issued" [R. 43].

Patsy McWaters [R. 51] testified that she went to Readmore at Mrs. Wathen's telephonic request [R. 51-52]. Mrs. McWaters witnessed the purchase of the two magazines from the sales clerk [R. 52].

Reverend Herbert Simpson [R. 54], a minister residing in Paducah [R. 54] and a member of the Citizens for Decent Literature [R. 57], testified that petitioner, in May of 1963, met with a ministers committee "on moral and social welfare" at the invitation of the ministers [R. 54], where they discussed the "same character and class" of magazines as the publications involved in the case herein [R. 56]. The group of ministers was interested in what "rules or standards" petitioner was maintaining in the store [R. 56]. At the meeting with petitioner, the ministers' organization did not specifically name any magazine [R. 57].

The Commonwealth rested its case [R. 59].

The petitioner testified that it was his policy at Readmore to cooperate with any group or even individual

that came to him to express a complaint [R. 65]. The volume of books and periodicals handled monthly at Readmore was extremely large [R. 63]. Petitioner did not even know that the two magazines herein involved were on the stand, and the first time he learned about them was when he received the summons based on Mrs. Wathen's complaint [R. 71].

Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office Department, and that he had written to his publishers to this effect [R. 63, 67; Deft. Ex. 1 for ident.]. Petitioner offered to prove that a wide variety of comparable magazines were sold by his distribution agencies throughout the numerous communities and areas serviced by said agencies, none of which magazines had ever been barred or restricted by any governmental authority or community in the areas where the magazines were sold [R. 69-70]. All these efforts by petitioner to prove lack of unlawful knowledge or intent were rejected by the trial court [R. 64-65, 66-67, 69-70].

Wade Sherrill [R. 82], on behalf of petitioner, testified that he was employed as receiving clerk and general warehouse manager for petitioner, doing business as the Basin News Company, the wholesale distributor for the Kentucky area as well as Missouri, Tennessee and parts of Illinois [R. 82]. An attempt was made to prove through the witness that he was under instructions as a matter of policy not to distribute magazines which had no second-class mailing permits, but objections to such testimony were sustained [R. 83]. The witness was also asked whether it was possible to check all the publications as to contents and character, but

objections to this line of questions were also sustained [R. 83-84].

The petitioner called Dr. C. S. Lowry [R. 84], holder of a Bachelor of Arts degree and a Master of Arts degree from Harvard University, and a Ph. D. degree from the University of Kentucky [R. 84]. Dr. Lowry has been with Murray State College at Murray, Kentucky for almost forty years, and is presently head of the Department of Social Science [R. 84-85].

Dr. Lowry, at the request of counsel, had examined the two magazines here involved [R. 87]. The witness stated that he was aware of the extent to which magazines of this type sold in the various areas in the community and in other States [R. 88-89]. In the opinion of the witness, the publications did not exceed customary limits of candor in the community, nor "go as far as some which are generally accepted" [R. 89]. Dr. Lowry was of the opinion that the magazines did not create a shameful or morbid interest in sex or nudity in the average person who might examine them [R. 90]. The witness had read the magazines from cover to cover [R. 91]. None of the textual material, in the opinion of the witness, was obscene, nor did the description of sex in the magazines exceed the description of sex in books and publications generally accepted [R. 91].

The petitioner offered through the witness to put into evidence books which had been sold and accepted in Kentucky, Tennessee and the entire geographical area [Deft. Exs. 4-9 for ident.; R. 94][1] but, upon objection

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[1]The books offered into evidence were *Tropic of Capricorn* by Henry Miller [Deft. Ex. 4]; *Carpetbaggers* by Harold Robbins [Deft. Ex. 5]; *Another Country* by James Baldwin [Deft. Ex. 6]; *Lady Chatterley's Lover* by D. H. Lawrence [Deft. Ex. 8]; and *One Hundred Dollar Misunderstanding* by Robert Gover [Deft. Ex. 9].

by the Commonwealth the offer was rejected [R. 94-95].

Petitioner called James Apple, an attorney-at-law [R. 95], as a witness in his behalf. Petitioner offered to prove through the said witness that the publication involved in the case of *Sunshine Book Co. v. Summerfield* was "more revealing of the body than either of the two publications in question here" [R. 95-96; Deft. Ex. 10 for ident.]. An objection to this offer of proof was sustained by the trial court [R. 96].

The petitioner offered as a witness in his behalf C. L. Werner, who was an investigator employed by counsel for petitioner [R. 96-97]. The petitioner offered to prove that the witness had obtained certain books of art from the Carnegie Public Library in Paducah, books of art which were available to the general public [R. 97-98]. The witness had made copies of pictures out of these various art publications and these pictures were offered into evidence as defendants Exhibits 11 through 19 [R. 98-99]. An objection to the offer of this testimony and all of the exhibits was sustained by the trial court [R. 99-100].

In rebuttal, the Commonwealth called Frederick G. Schlafer, a Pastor of the Baptist Tabernacle, who testified that he had been a minister since 1938 [R. 102]; that "within the last 24 hours" he had looked at the two magazines and that in his opinion the magazines would appeal to the longing for something lewd or lecherous in the average person [R. 103].

There were requests by petitioner for instructions to the jury which were in most cases refused [R. 12-25]. Some of the rulings of the court in this area are

discussed hereafter. Among other things, the trial court refused to instruct the jury that if the jury found that petitioner had a good faith belief that the magazines in question were not obscene, the jury should acquit petitioner even if they personally believed that the magazines were obscene [Prop. Inst. No. 19; R. 17]. The trial court instructed the jury [R. 26-28] and the jury returned a verdict of guilty and fixed the punishment at a fine of $250.00 [R. 11]. Motions made by the petitioner to set aside the verdict, to dismiss the complaint and for a new trial all were denied by the trial court [R. 29-33]. Thereafter, as aforestated, the Court of Appeals of Kentucky denied petitioner's motion for appeal [R. 147] and petitioner's petition for rehearing [R. 135, 151].

How Federal Questions Are Presented.

Upon appeal from the McCracken County Court to the McCracken Circuit Court, petitioner moved before trial that the conviction and fine imposed in the county court be set aside and the complaint against petitioner dismissed. The grounds for the aforesaid motion were that Kentucky Revised Statutes 436.100 is unconstitutional as contrary to, in conflict with, and in violation of the due process clause of the Fourteenth Amendment, and further that the publications involved in the case were protected by the First and Fourteenth Amendments [R. 7]. These federal questions were again raised in a motion to dismiss immediately prior to the commencement of the trial [R. 9], and in the motion for a directed verdict of acquittal at the conclusion of the Commonwealth's testimony [R. 59] and at the conclusion of the entire case [R. 29-32]. In petitioner's motion to

set aside the verdict and for a new trial, the grounds for the motion again included the claims that the magazines were protected by the First and Fourteenth Amendments and were not obscene, that the Commonwealth had failed to prove the alleged obscenity of the publications, that the statute was unconstitutional in violation of the Fourteenth Amendment, and that the trial court had, contrary to the requirements of the First and Fourteenth Amendments, erroneously excluded evidence bearing on issues of contemporary community standards and petitioner's knowledge and intent [R. 30-32].

The same federal questions were raised and discussed in detail by petitioner in support of his appeal to the Court of Appeals of Kentucky [R. 139, 145] and in petitioner's petition for rehearing before the Court of Appeals following the denial of the motion for appeal [R. 148].

Reasons for Granting the Writ.

1. In a constitutional sense, the two magazines herein involved are clearly not obscene and are, therefore, entitled to the protections of the First and Fourteenth Amendments to the Constitituion of the United States. The publications do not exceed customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex and nudity, and, applying contemporary community standards, they do not appeal to the prurient interest of the average person. The magazines in question contain pictures and stories which are comparable to thousands of other pictures and stories appearing in books and magazines which the average person has seen or read

for many years and found entertaining, amusing and informative. If harmless magazines such as are involved herein can be deemed obscene and without constitutional protection, the standards for judging freedom of expression will become at large and endanger all writings dealing with sex.

Under criteria enunciated by both the federal and state courts, the magazines are entitled to First Amendment protection. Although the decision in *Roth v. United States* [*Alberts v. California*], 354 U.S. 476, was rendered without consideration of the material involved, the Solicitor General, in his argument and brief on behalf of the United States in the Supreme Court, urged that obscenity statutes were intended primarily to cover "hard core pornography", material described by the Solicitor General as "black-market" material which is "manufactured clandestinely in this country or abroad and smuggled in" (*Roth v. United States*, Brief for the United States, at 37). An examination of the magazines at issue in this case makes it obvious that they do not come within the class of material upon which the Solicitor General placed his primary emphasis before this Court in *Roth-Alberts*.

Particularly significant are the decisions by this Court which followed *Roth-Alberts*. In *One, Inc. v. Olesen*, 355 U.S. 371, the magazine "One—the Homosexual Magazine" was involved. The material in the magazine was described in the Court of Appeals for the Ninth Circuit as follows:

> "The picture and the sketches are obscene and filthy by prevailing standards . . . stories are obscene, lewd and lascivious . . . offensive to the

> moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. . . ."
>
> 241 F. 2d 772, 778 (9 Cir. 1957).

The Court of Appeals condemned the magazine and the material contained therein as obscene, but this Court reversed in a *per curiam* opinion, citing *Roth v. United States.*

In *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; there was involved a nudist magazine which had been meticulously examined by both the District Court and the Court of Appeals. The District Court held that the pictures in the magazine revealing the genitalia of men, women and children were obscene, that the photos of women with "large elephantine breasts" showing "the pubic area" presented an "over-all picture" of "vulgarity, filthy, obscenity and dirt" 128 F. Supp. 564, 572 (D.C. D.C. 1955). The Court of Appeals agreed that the "extensive, particularized descriptions of the offending and offensive material . . . . speak for themselves" 249 F. 2d 114, 118 (D.C. Cir. 1957).

Again, this Court reversed, citing *Roth v. United States.*

The material in *Times Film Corp. v. City of Chicago,* 355 U.S. 35, was described by the Court of Appeals for the Seventh Circuit in these terms:

> ". . . We found that, from beginning to end, the thread of the story is super-charged with a current of lewdness generated by a series of illicit sexual intimacies and acts. . . . The erotic thread of the story is carried without deviation toward any wholesome idea, through scene after scene. . . ."
>
> 244 F. 2d 432, 436 (7 Cir. 1957).

This Court reversed in a *per curiam* opinion, citing only *Alberts v. United States.*[2]

With deference, it is submitted that the two magazines in the case herein involved cannot be denied constitutional protection in the light of the aforesaid rulings by this Court. In *Jacobellis v. Ohio,* 378 U.S. 184, 192, it was stated;

> ". . . This Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. . . . This is precisely what the Court did in Times Film Corp. v. City of Chicago, 355 U.S. 35; One, Inc. v. Olesen, 355 U.S. 371; and Sunshine Book Co. v. Summerfield, 355 U.S. 372."

In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, Justice Harlan announced the judgment of the Court reversing the ruling of the Court of Appeals holding that the magazines "Manual", "Trim" and "Grecian Guild Pictorial" were violative of the federal obscenity statute. The Court of Appeals described the magazines as "photographs of nearly nude male models," some of the pictures appearing to be "primary symbols of sexual fantasies of deviants within the homosexual

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[2]See also, *Mounce v. United States,* 355 U.S. 180, reversing 247 F. 2d 149 (9 Cir. 1957). In *Mounce,* District Judge Driver in Washington initially upheld the forefeiture of imported paperbound books seized by the Customs Service as "obscene". The District Judge held that the "emphasis on normally private areas" of nude men and women rendered the books unlawful. *United States v. 4200 Copies Int'l. Journal,* 134 F. Supp. 490, 494 (D.C. Wash. 1955). After reversal by this Court in 1957 and remand by the Court of Appeals, Judge Driver found that none of the publications were "obscene" under the newly enunciated standards of this Court (D.C. Wash., No. 1286).

group" 289 F. 2d 455 (D.C. Cir. 1961). Justice Harlan observed that the most that could be said of the magazines was that they were "dismally unpleasant, uncouth, and tawdry. But that is not enough to make them 'obscene.'" 370 U.S., at 490. Justice Harlan stated that the portrayal of the male nude in the questioned magazines could not be regarded as more objectionable "than many portrayals of the female nudes that society tolerates" 370 U.S., at 490.

The Supreme Court of Ohio described the motion picture film entitled "The Lovers" in *State v. Jacobellis,* 173 Ohio State 22, 179 N.E. 2d 777, 781 (1962), as more than "hard core pornography, *i.e.,* filth for filth's sake. It was worse. It was filth for money's sake." The Court expressed its "complete revulsion" at the film's showing of "an act of perverted obscenity" 179 N.E. 2d at 781.

In the opinion reversing the judgment of the Ohio court (*Jacobellis v. Ohio,* 378 U.S. 184), Justice Brennan stated:

> "We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in *Roth v. United States* and *Alberts v. California,* which we reaffirm here." 378 U.S. at 196.

Justice Goldberg, concurring, also stated that he had viewed the film and that it dealt with a

> "familiar subject in old and new novels, and in current soap operas," expressing the further view that "by any arguable standard the exhibitors of this motion picture may not be criminally prosecuted" 378 U.S. at 198.

Since the decision in *Roth-Alberts*, and the aforesaid subsequent decisions, the federal and state courts have given constitutional protection to magazines comparable in all respects to the so-called two "girlie" magazines involved in the case herein. In *Excellent Publications, Inc. v. United States*, 309 F. 2d 362 (1 Cir. 1962), the Government contended that the context of the magazines involved, when combined with reproduced photographs

> "of provocatively posed nude and partially nude female models makes each magazine as a whole 'obscene' according to the standard laid down by the Court in the Roth case and elaborated upon by Justices Harlan and Stewart in the Manual Enterprises case" 309 F. 2d at 364.

In answer to the argument of the Government, the Court of Appeals succinctly stated:

> ". . . We cannot agree. . . . The pictures of nude and near nude women are titillating and provocative. But so also are some of the greatest works of pictorial art. The pictures in 'The Gent' are no more provocative than those on the covers of many pocket books generally on display in drug stores, newsstands, book stores and like establishments. . . . In short the pictures simply are not the kind of 'hard core pornography' within the reach of the statute construed in the light of the constitutional guarantee of freedom of the press. . . ."
>
> 309 F. 2d at 364-365.[3]

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[3]On June 24, 1965, District Judge Templar granted a motion to dismiss a 22-count indictment charging violations of the federal obscenity statute. *United States v. Linetsky*, No. T-CR-582 (D.C. Kans.) unreported. Referring to the magazines therein involved,

The state courts have accepted the view that magazines of the type herein involved are constitutionally protected. In *People v. Richmond County News*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961), the magazine "Gent", containing pictures and articles allegedly importing "debauchery of the sexual faculty" was held not obscene and constitutionally protected.

In *Larkin v. G.I. Distributors, Inc.*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760 (1964), the Corporation Counsel of the City of New York brought an action against a magazine distributor for an injunction to restrain the distribution of certain "girlie" magazines on the ground that the magazines were obscene. The actual magazines involved were entitled: "Touch", "Tonight", "Cocktail", "Snap", "Showcase" and "Sir Knight". The complaint was dismissed in the Supreme Court (41 Misc. 2d 165, 245 N.Y.S. 2d 553) and the Appellate Division affirmed the judgment of dismissal holding that the magazines were not obscene (19 A.D. 2d 609, 241 N.Y.S. 2d 159). On appeal to the Court of Appeals, the Corporation Counsel argued that the "six magazines in question consist essentially of masses of photographs of nude or semi-nude women in sexually

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the Court stated in its opinion, among other things: ". . . [U]nder the decided cases, 'Girlie' magazines and illustrations of females in the nude are not classified as 'hard-core pornography'. See infra, *Excellent Publications*. . . . [T]he Court feels under the announced rule that he must accept the declaration that 'Girlie' magazines containing nude or partially nude young women, usually portrayed in seductive poses, without exposure of genitalia, are not to be held as 'hard core pornography'." See also, *United States v. Wasserman* (D.C. Kansas) No. T-CR-5811, decided June 29, 1965, also by District Judge Templar, dismissing a 22-count indictment charging the mailing of allegedly obscene movie films.

provocative poses, with an accompaniment of sex-centered stories or comments depicting or discussing in suggestive and inflammatory detail, sexual episodes and erotic activities, including sexual intercourse." (*Larkin v. G. I. Distributors, Inc.*, Appellant's Brief on behalf of the Municipality, p. 2.)

The Court of Appeals of New York affirmed the judgment of the lower courts with the following opinion:

> "Judgment affirmed, without costs (People v. Richmond County News, 9 N.Y.2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 [1961]; Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 [1957]; Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 [1957]; Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325; 1 L.Ed. 2d 1469 [1957]; Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 [1957]; One, Inc. v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352 [1958]; Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 [1959]; Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 [1959]; Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 [1962])."[4]

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[4]On June 17, 1965, the Appellate Division of the Circuit Court of Connecticut in *Connecticut v. Martin, et al.*, Nos. CR 2-14187 AP and CR 2-14188 AP, unreported, reversed a judgment confiscating and destroying as a nuisance certain nudist magazines alleged to be obscene. The nudist magazines involved were entitled: "Urban Nudist", "The Western Nudist", "American Nudist" and "Suntan".

On February 16, 1965, the Honorable Walter R. Evans, a Judge of the Superior Court of the State of California for the County of Los Angeles, dismissed a count of an indictment in *People v. Luros, et al.*, No. 295183, unreported, which alleged

It is evident that customary freedom of expression as shown by the aforesaid rulings and opinions of the courts throughout the country embraces the two magazines involved herein. The articles contained in the publications do not exceed the limits of candor in the description of sex found in a multitude of writings which are today accepted as bestsellers and which have in many cases been judicially determined to be entitled to constitutional protection. See, for example, *Tralins v. Gerstein*, 378 U.S. 576 (*Pleasure Was My Business*); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (*Tropic of Cancer*); *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, affirming 175 F. Supp. 488 (*Lady Chatterley's Lover*); *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965) (booklets entitled: "Questions and Answers Involving Sexual Ethics and Sexual Esthetics"; "Questions and Answers on Sex and the American Attitude"; "Questions and Answers on Sex Physique Disparity"; "Questions and Answers on the Sex Life and Sexual Problems of Homosexuals of Both Sexes"; "Questions and Answers About Oragenital Contacts"; "Questions and Answers about Cunnilingus"; "Questions and Answers on Undinism"; and "Revelations of a Sexologist").[5]

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that the following magazines were obscene: "Tip Top", Vol. 3, Nos. 1, 2, 3, 4 and 5, "Nylon Jungle", Vol. 1, No. 3 and No. 4 and Vol. 2, Nos. 1 and 2, "Sun Era", Vol. 1, Nos. 8, 10 and 11, "Photo Field Trip", Vol. 1, No. 6, "Urban Nudist", Vol. 1, Nos. 10, 11, and 12. The Superior Court stated that the aforesaid magazines "do not fit within the definition of obscenity as laid down by the United States Supreme Court" [Rep. Tr. p. 4].

[5]In *Kansas, Ex rel. Londerholm etc., v. Quantity of Copies of Lewd, Lascivious and Obscene Books, Titled: "Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," "Flesh Avenger,"* No. C-3595-64, unreported, the Honorable Tom Raum, a Judge of the District

It is respectfully submitted that the publications involved herein are far less candid than material found constitutionally protected by the aforesaid decisions. Clearly, these magazines do not constitute criminal speech and the application of a state obscenity statute to such constitutionally protected material can only have a "chilling effect upon the exercise of First Amendment rights" (*Dombrowski, et al. v. Pfister*, 380 U.S. 479, 487.

The Kentucky statute, as construed and applied to the magazines herein, is clearly unconstitutional and does violence to the free speech and due process provisions of the First and Fourteenth Amendments. In the light of the decided cases, both in this Court and throughout the land, the judgment of conviction herein, it is submitted, should be summarily reversed.

Court of Sedgwick County, Kansas, held in July 1965 that all the named writings were constitutionally protected.

On June 14, 1965, the Honorable Joseph A. Sprankle, Jr., a Judge of the Superior Court of the State of California for the County of Los Angeles, in *People v. Luros, et al.*, No. 295183, *supra*, dismissed another count of the indictment alleging that certain named books were obscene. The books were entitled: *Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment* and *Honey Lips*. The Court found that none of the books involved exceeded contemporary community standards nor were any of the books utterly without redeeming social importance.

See also, *People v. Birch*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sup. Ct. Cr. 1963) [books entitled: *Sex Kitten, Clip Joint Cutie, The Wild Ones, The Hottest Party in Town, Passion Pit, Bedroom at the Top, Butch*, and *College for Sinners*, described as containing "a great number of descriptions of sexual activity which, in many cases, are only tenuously associated with the plot and story line" (243 N.Y.S. 2d at 528)—held not obscene and indictment dismissed]; *People v. Druss*, N.Y. Sup. Ct. Cr. #431-63, September 6, 1963 [obscenity indictment dismissed—books entitled: *Strange Breed, Pagan, Swing Low Sweet Sinner, Sex Plan, A Rage Within, Horizontal Secretary* and *None But the Wicked*].

2. Kentucky Revised Statutes 436.100, on its face and as construed and applied by the state court, violates the free speech and press and due process provisions of the First and Fourteenth Amendments, as well as other safeguards contained in the Bill of Rights which are subsumed into the due process provisions of the Fourteenth Amendment.

(a) The statute provides that the sale of any magazine found by the trier of fact to be obscene "shall be *prima facie* evidence that the seller . . . who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure" [K.R.S. 436.100(4)]. In other words, the mere sale of a book or other writing by a bookseller in a retail establishment is on its face evidence that the vendor had knowledge of the "obscene character" of the book or writing sold.

It is submitted that such construction of the statute does no more than impose the same strict or absolute criminal liability for the sale of an allegedly obscene book as was condemned by this Court in *Smith v. California*, 361 U.S. 147, and removes procedural due process safeguards for freedoms of speech and press which was held violative of the Constitution in *Speiser v. Randall*, 357 U.S. 513.

It will be observed from the provisions of the statute that booksellers are penalized for the sale of books or other writings found ultimately to be obscene, even though they had not the slightest notice of the character of the books they sold. It follows that the tendency of the bookseller will be to restrict the sale of all books and writings to those which he has inspected. These

restrictions will inevitably restrict the public's access to reading matter.

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U.S., at 154.

The only circumstance set forth in the statute to justify the elimination of proof of *scienter* is the fact that a book or other writing is sold with "intent to sell" such book or other writing. Such a circumstance is clearly unsupportable as a justification under the Constitution of the United States for the elimination of the *scienter* requirement. To permit a finding of knowledge of the alleged obscenity of a book or other writing, based solely on an intent to sell the book or other writing, is to cast upon the bookseller the same onerous burdens with the same consequent restrictive tendencies as are present in any statute which eliminates the *scienter* requirement. *Smith v. California,* 361 U.S. 147. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 283-284; *Garrison v. Louisiana,* 379 U.S. 64, 73-74; *Henry v. Collins,* 380 U.S. 356.

In *Smith v. California, supra,* this court held that the prosecution in an obscenity case was required to plead and prove that the accused knew that the material was obscene. This constitutional requirement has been reiterated in court decisions. See, *State v. Locks,* 397 P. 2d 949 (Ariz., 1964); *State v. Sul,* 146 Conn. 78, 147 A.

2d 686, 691 (1958); *Demetropolos v. Commonwealth,* 342 Mass. 658, 175 N.E. 2d 259, 262 (1961); *State v. Oman,* 261 Minn. 10, 110 N.W. 2d 514, 520 (1961); *Cohen v. State,* 125 So. 2d 560, 563 (Fla. 1961); *State v. Hudson County News Co.,* 35 N.J. 284, 173 A. 2d 20, 25 (1961). See also, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L.Rev.5, 103-108 (1960). See also, *Freedman v. Maryland,* 380 U.S. 51. ". . . [T]he burden of proving that the film is unprotected expression must rest on the censor" 380 U.S., at 58.

Under the statute herein, the State has refused to bear the burden of producing evidence of *scienter* as part of the proof of a bookseller's guilt. The State requires the bookseller to bring forth proof and persuade the trier of the fact that he did not have knowledge of the obscenity of the book. This burden is placed upon the bookseller without any proof by the prosecution that the bookseller had such guilty knowledge. The bookseller may be convicted without proof of *scienter* and despite his protestations so long as the fact-finder believes that the book or other writing involved is obscene. Clearly under such circumstances, a bookseller will prudently refrain from dealing with any book or writing involving sex in order to avoid assuming such precarious burden. How can a bookseller fairly sustain the burden of proving lack of *scienter* when the mere sale of the book is *prima facie* evidence of *scienter* upon which the trier of facts can return a finding of guilt if the trier of the facts believes that the book or writing is obscene?

In practical operation, therefore, the *prima facie* presumption which the statute creates produces the same inhibition on the circulation of constitutionally protected material as was attempted by the Los Angeles Ordinance in *Smith v. California.*

> "The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." *Speiser v. Randall,* 357 U.S. 513, 529.

It is plain, and this apart from free press considerations, that the statute here improvises a presumption which runs contrary to the due process provisions of the Constitution. To permit an inference of *scienter* from the mere sale of a book found by a fact-finder to be obscene is to open the door wide for the conviction of innocent booksellers. A book or writing which a fact-finder has found obscene will inevitably lead the fact-finder to subjectively assume that what the fact-finder knows the bookseller should also have known. Such a conclusion is of course arbitrary, capricious and irrational. Proof alone of the sale of a book or writing is not such circumstance from which one can rationally infer a conclusion that a bookseller was aware of its obscene character. *Tot v. United States,* 319 U.S. 463; *Manley v. Georgia,* 279 U.S. 1; *Bailey v. Alabama,* 219 U.S. 219; *Eastern & Atl. R. Co. v. Henderson,* 279 U.S. 639.

> ". . . [T]he legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." *Tot v. United States, supra,* at 469.

Moreover, the statute here on its face is patently capable of many unconstitutional applications, capable of sweeping within its ambit constitutionally protected expression and of inhibiting the circulation of material protected by the provisions of the First Amendment. As written, the statute cannot stand consistent with the broad guarantees of the Bill of Rights. The statute places limitations on free speech and press guarantees, undermines procedural safeguards particularly required in prosecutions involving speech and press, and unlawfully compels persons to take the stand in criminal prosecutions and prove the lawfulness of their conduct under onerous and unfair circumstances. *Thornhill v. Alabama*, 310 U.S. 88; *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Speiser v. Randall*, 357 U.S. 513, 526; *Tot v. United States*, 319 U.S. 463, 469, 473; *Thompson v. City of Louisville*, 362 U.S. 199, 206 and cases cited in n.13; *New York Times Co., et al. v. Sullivan*, 376 U.S. 254, 271, 277-280, 283-288; *Freedman v. Maryland*, 380 U.S. 51, 57-58.; *Malloy v. Hogan*, 378 U.S. 1, 6-8.

(b) The vice of the statute on its face is further compounded by the construction and application of the statute to the petitioner here.

The petitioner requested the trial court to instruct the jury that if the jury found that the petitioner had a good faith belief that the magazines in question were not obscene, then the jury should acquit petitioner, even if they believed the magazines were obscene [Prop. Inst. No. 19; R. 17]. Other instructions requested by the petitioner on the issue of *scienter* were also refused by the trial court [See, Prop. Inst. Nos. 1, 6, 7, 8;

R. 12-14]. Thus, the trial court excluded any possibility of acquittal upon the basis of honest ignorance. Under the Kentucky statute, therefore, an honest mistake as to whether the writing involved is obscene is not an excuse. Such construction and application of the statute simply means that the Kentucky statute here is in no way different from the enactment which this Court considered in *Smith v. California.*

By construction and application of the law, Kentucky has enunciated the rule that in obscenity prosecutions there is in fact a conclusive presumption of guilty knowledge and intent solely from the sale of the book. Under such circumstances, the statute is vulnerable on due process and free speech grounds. To relieve the prosecutor in an obscenity action from the burden of proving *scienter,* and then to hold that even honest ignorance by the accused of the alleged obscenity of the writing is not a defense, constitutes a broad departure from the specific constitutional guarantees and the rulings of this Court. *Speiser v. Randall,* 357 U.S. 513, *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *A Quantity of Copies of Books, et al. v. Kansas;* 378 U.S. 205.

Professors Lockhart and McClure suggest that "the scienter requirement has not been met if, . . . the seller honestly believed that the book was not obscene." Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 103, 107 (1960). The authors state that:

> ". . . the character of many books is such that it will be impossible, under evolving constitutional standards, to determine in advance of a judicial rul-

> ing whether a book is 'obscene,' even with the best legal advice. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of significant literature that is not obscene, for it would result in the very 'self-censorship . . . privately administered' and 'timidity in the face of absolute criminal liability' that the Court sought to avoid by imposing the scienter requirement." (*Id.*, at 106.)

Moreover, the elimination of the defense of honest ignorance of obscenity is a denial of due process "in the primary sense", the right to be heard in one's defense. *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673, 681; *Saunders v. Shaw,* 244 U.S. 317; *Hovey v. Eliott,* 167 U.S. 409, 417. If it is an offense to sell a book with knowledge of either its contents or its character [K.R.S. 436.100(2)], then it clearly must be constitutionally relevant for an accused to testify that he in good faith neither knew the contents nor the obscene character of the writing.

(c) Moreover, the unlawful construction and application of the statute is further exemplified by the rulings of the trial court.

Every effort on the part of petitioner to prove a lack of knowledge of the contents or the alleged obscenity of the two magazines was rebuffed by the trial court. Petitioner was not permitted to prove either through his own testimony or through the testimony of his employees that it was impossible to inspect each of the writings sold at Readmore [R. 63-64, 83-84]. Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office

Department, that he had written to all his publishers to that effect, and that he had instructed his employees not to distribute magazines which had no second-class mailing permits. All of these offers were rejected [R. 63-70, 83; Deft. Ex. 1 for ident.]. Furthermore, petitioner's offer to prove that a wide variety of comparable magazines were sold by him without bar or restriction of any governmental authority was also rejected [R. 69-70]. The short of the matter is that every effort by petitioner to prove, in fact, that he had no knowledge of the obscene character of the magazines was thwarted.

The due process provisions of the Constitution were intended to guarantee procedural standards adequate and appropriate to protect at all times individuals charged with or suspected of crime by persons holding positions of power and authority. *Chambers v. Florida*, 309 U.S. 227.

> "This Court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense." *Holden v. Hardy*, 169 U.S. 366, 389-390.
>
> "Can it be doubted that due process of law signifies a right to be heard in one's defense? . . ." *Hovey v. Elliott*, 167 U.S. 409, 417.
>
> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings

> in which evidence is received and weighed by the trier of the facts. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." *Morgan v. United States,* 298 U.S. 468, 480-481.

The trial court licensed the jury to make its own subjective determination on the issue of *scienter* and deprived petitioner of basic procedural and substantive freedoms guaranteed by the Constitution.

It is submitted, in the light of all of the aforesaid discussion, that the statute here, on its face and as construed and applied, cannot stand consistent with the requirements of the provisions of the First and Fourteenth Amendments, as well as the procedural guarantees contained in the provisions of the Fifth and Sixth Amendments entitling an accused to be informed of the nature and character of the accusation made against him and to freedom from compulsory self-accusation.

3. The exclusion of constitutionally relevant evidence on the issue of contemporary community standards also resulted in an arbitrary deprivation of petitioner's liberty without due process of law and an abridgement of free press guarantees.

During the trial, petitioner offered into evidence comparable writings which had been sold and accepted in the community [Deft. Exs. 4-9 for ident.], but an objection to their introduction was sustained by the Trial Court upon the ground that "we only have the two magazines on trial" [R. 94-95]. An attempt to introduce into evidence a court ruling holding a comparable publication not to be obscene and constitutionally protected

was also thwarted [Deft. Ex. 10 for ident., R. 95-96]. Comparable pictures taken from art books contained in the public library in Paducah were also excluded [Deft. Exs. 11-19 for ident.; R. 98-100].

Thus, cogent and salient evidence bearing on the issue of contemporary community standards was excluded by the Trial Court. Prior to the decision by this court in *Roth-Alberts,* decisions in the obscenity area were generally based on the alleged effect of the material upon those highly susceptible persons whom the material was likely to reach. This court's decision, however, rejected the *Hicklin* test as unconstitutionally restrictive, and substituted as one of a number of ingredients for judging obscenity the criterion of contemporary community standards. As this court's opinions have made clear, from *Roth* to *Jacobellis,* a judgment of conviction in an obscenity prosecution can no longer stand, unless there is proof that the publication first exceeds contemporary standards and, further, appeals to the prurient interest of the average person and is utterly without redeeming social importance.

It appears plain, therefore, that when relevant evidence on the issue of community standards is offered by an accused in an obscenity prosecution, and excluded, the case involves not only due process in the primary sense but also provisions of the First Amendment affecting freedoms of speech and press. The exclusion of evidence establishing customary freedom of expression in the Nation deprives the accused of essential evidence intended to prove that the writing in question is constitutionally protected.

The American Law Institute had declared in 1957 that its test for judging obscenity was "designed to as-

sure reception" of evidence bearing on the issue. A.L.I., *Model Penal Code* (Tent. Draft No. 6, 1957) 44. See, Section 207.10(2) of Tent. Draft No. 6; *supra*, 1-2, and Comments in Tent. Draft No. 6, at 10, 11, 29-31, 39-43, 43-46, 46-49. See also, American Law Institute, *Proceedings*, 34th Annual Meeting (1957) 158-174, 187, 194, 202. The Institute stated on the issue of "customary limits of candor" that in any obscenity prosecution, evidence should be admissible to show "the degree of public acceptance of the material in this country". Tent. Draft No. 6, *supra*, 2, 44.

In *Smith v. California*, 361 U.S. 147, the issue of exclusion of evidence in obscenity prosecutions was discussed by Justices Frankfurter and Harlan. Justice Frankfurter stated:

> ". . . Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S.476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge."
>
> 361 U.S. at 165.

Justice Harlan stated:

> ". . . I agree with my Brother Frankfurter that the trier of an obscenity case must take into account 'contemporary community standards', *Roth v. United States*, 354 U.S.476, 489. . . . Appellant attempted to compare the contents of the work with

> that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance. . . . In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards. . . . This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue."
>
> 361 U.S. at 171-172.

The Courts following *Smith* have recognized that the exclusion of comparison testimony constitutes a denial of due process and renders the proceedings in an obscenity prosecution constitutionally defective. The Courts have accepted the view that the enunciation of the "contemporary community standards" principle in obscenity cases means that comparison testimony is fully relevant, and that since obscenity cases are open to broad review on appeal, the admission of such evidence is necessary to provide a record upon which appellate judges can base a constitutional judgment. *In re Harris,* 56 Cal. 2d 879, 16 Cal. Rptr. 889, 336 P. 2d 305 (1961); *Yudkin v. State,* 229 Md. 223, 182 A. 2d 798 (1962); *Zenith International Film Corp. v. City of Chicago,* 291 F. 2d 785, 789-790 (7 Cir., 1961); *Grove Press, Inc. v. Christenberry,* 175 F. Supp. 488, 502 (D.C. N.Y., 1959), aff'd. 276 F. 2d 433 (2 Cir., 1960).

In summary, the wholesale exclusion of constitutionally relevant evidence by the Trial Court deprived petitioner of a fair trial and his liberty and property without due process of law, and constituted a serious abridgment of free press provisions of the Constitution.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the judgment of conviction reversed.

Respectfully submitted,

STANLEY FLEISHMAN and
CHAS. A. WILLIAMS,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Judgment of the McCracken Circuit Court.

On the 28th day of February, 1964, the following order was entered herein, to-wit:

Commonwealth of Kentucky, Plaintiff, v. #9443 "Sale of Obscene Literature" William L. Austin, Defendant.

Came the jury empaneled herein on yesterday. Came all parties in interest and the trial of this case was resumed. At the conclusion of all the evidence, the defendant offered (51) separate instructions, some of which the Court gave or incorporated in his instructions and the remainder of which were refused, to which defendant objects and excepts. The Court gave to the jury Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, & 9, to which both parties object and except. Ordered that all said instructions, both those offered and refused and those given by the Court, be filed and made a part of the record herein without being spread upon the order book. Argument of counsel being concluded the jury retired for deliberation and returned into open court the following verdict: "We, the jury, find the defendant, William L. Austin, guilty and fix his punishment at $250.00 fine (Two Hundred & Fifty Dollars) /s/ Fred M. Herde, Foreman".

Wherefore it is Adjudged by the Court that the Commonwealth of Kentucky, recover of defendant, William L. Austin, the sum of Two Hundred Fifty Dollars ($250.00) Dollars in fine, and its cost expended, for all of which capias pro fine is awarded.

BOND FOR THE PURPOSE OF APPEAL IS SET AT $350.00.

APPENDIX B.

Per Curiam Opinion of Court of Appeals.

Rendered: January 22, 1965.

Court of Appeals of Kentucky.

William L. Austin, Appellant v. Commonwealth of Kentucky, Appellee.

Appeal from McCracken Circuit Court, C. Warren Eaton, Judge.

PER CURIAM

Motion for an appeal from a judgment of conviction of offering obscene literature for sale contrary to KRA 436.100 and imposing a fine of $250.00 and costs.

We find no error in the trial, and the motion for an appeal is overruled.

Moremen, C.J., dissenting.

Attorney for Appellant: Charles A. Willaims, Paducah, Kentucky.

Attorneys for Appellee: Robert F. Matthews, Atty. Gen., John B. Browning, Asst. Atty. Gen., Frankfort, Kentucky. Albert Jones, Commonwealth Atty., Paducah, Kentucky.

APPENDIX C.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. The pertinent provisions of Kentucky Revised Statutes, section 436.100 are:

> "(1) Where the term 'person' is used in this section, it shall be taken to mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.
>
> "(2) Any person who, with knowledge of the contents or character, sells, lends, gives away or shows, offers to sell, lend, give away or show, has in his possession with intent to sell, lend, give

away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such matter or article, or who writes, prints, publishes or utters or causes to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state, where, how, of whom or by what means any such matter or article named in this section can be purchased, obtained or had, or who employs, uses or permits any minor to do so, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both so fined and imprisoned.

. . .

"(4) The sale, loan, gift, showing or offer to sell, loan, or the possession with intent to sell, lend, give away or show of any book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image found to be obscene, shall be prima facie evidence that the seller, lender, giver or possessor who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure. (1962, c. 273, § 2; subsections (1), (3) and (4) created by 1962, c. 273, §§ 1, 3 and 4)."